Supreme Court, U.S.
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No. 97-1028

In The

Supreme Court of the United States

October Term, 1997

JOE A. MACRI; LOUISE MACRI; JOE F. MACRI and ELEANOR MACRI,

Petitioners,

vs.

KING COUNTY, a political subdivision of the State of Washington,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court issue an advisory opinion regarding the relationship between a Fifth Amendment taking claim and a Fourteenth Amendment substantive due process claim in a case where petitioners have already both obtained the invalidation of a land use regulation and been paid compensation for the financial losses they incurred as a result of the regulation?

2. Should this Court address whether petitioners' Fifth Amendment taking claim was properly dismissed on ripeness grounds, when this issue is moot because petitioners' Fifth Amendment taking claim is now ripe, with or without action by this Court?

3. Should this Court address whether petitioners' Fifth Amendment taking claim was properly dismissed on ripeness grounds, when this claim is moot because petitioners have already been compensated for the taking of their property?

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STATEMENT OF THE CASE

This case arises out of petitioners' application to subdivide 3.1 acres of real property located in unincorporated King County into 11 building lots. *Macri v. King County*, 126 F.3d 1125, 1127 (9th Cir. 1997). King County denied petitioners' subdivision application. *Id.* Petitioners sued in state court and obtained an order invalidating the County's denial of their subdivision application. *Id.* Pursuant to the order of the state court, King County approved petitioners' subdivision application. *Id.*

Subsequent to the state court action, petitioners filed the instant action seeking compensation for the alleged violation of their constitutional rights occasioned by the denial of their subdivision application.[1] The district court dismissed petitioners' federal taking claim seeking compensation under the Fifth Amendment on ripeness grounds, since petitioners had not yet sought compensation under state law. *Id.* The district court also granted summary judgment dismissing petitioners' claim that the County's denial of their subdivision application violated their substantive due process rights. *Id.* Finally, the district court dismissed petitioners' state law claims, with the exception of petitioners' state taking claim, which the district court remanded to state court for resolution. *Id.*

On appeal, the Ninth Circuit affirmed. *Id.* at 1131. The Ninth Circuit affirmed the dismissal of petitioners' substantive due process claim by applying *Graham v. Connor*, 490 U.S. 386 (1989) and *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) to conclude that the due process clause of the Fourteenth

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1. While petitioners have sued King County to try to collect money for the County's allegedly unconstitutional delay in approving their subdivision application, petitioners have done nothing to try to actually develop their property. *See Macri*, 126 F.3d at 1127.

Amendment provides no substantive protection for petitioners, whose claim falls within the ambit of the explicit textual protection afforded by the Fifth Amendment's taking clause. *Id.* at 1128-29. Petitioners then filed their Petition for Writ of Certiorari with this Court. *See* Petition for Writ of Certiorari (hereinafter Petition).

Three facts in this case bear emphasis. First, petitioners' substantive due process claim in this case has been adjudged to be without merit. Petitioners complain that the Ninth Circuit dismissed their substantive due process claim on the basis of *Graham* and *Armendariz*, rather than reaching the merits of their claim. *See, e.g.*, Petition at 6-8. The district court in this case, however, did reach the merits of petitioners' substantive due process claim. *Macri*, 126 F.3d at 1127. The district court dismissed petitioners substantive due process claim on the ground that it has no merit. *Id.* Therefore, even if dismissal of petitioners' substantive due process claim pursuant to *Armendariz* was error, it was harmless error, because petitioners' substantive due process claim has been adjudged to be without merit, in any event.

Second, petitioners have already obtained invalidation of the land use regulation that they allege violated their constitutional rights in this matter. *See id.* Petitioners sued in state court and succeeded in invalidating the County's denial of their subdivision application. *Id.* Subsequently, King County approved petitioners' subdivision application. *Id.*

Petitioners filed the instant action seeking only money. *See id.* Therefore, when petitioners complain in their Petition that some litigants might assert a substantive due process claim in order to obtain invalidation of a land use regulation, and not compensation, they are speaking about a hypothetical litigant other than themselves. *See* Petition at 20-23. In this case, petitioners seek only compensation. *See Macri*, 126 F.3d at 1127.

Third, petitioners have been compensated for the taking of their property. Following the district court's order in this case, the parties voluntarily settled petitioners' state taking claim. *Id.* Therefore, petitioners' argument that their federal taking claim should not have been dismissed on ripeness grounds is moot. Petitioners voluntarily settled their state taking claim, and have not asserted that their remedy under state law was inadequate to fully compensate them for the taking of their property.

REASONS FOR DENYING THE WRIT

Petitioners argue that this Court should accept review in this case in order to resolve a significant and direct conflict between the circuits and between the Ninth Circuit's decision in this case and this Court's jurisprudence. *See* Petition at 9-23. Petitioners urge this Court to accept review in this case and announce that invalidation of an unconstitutional land use regulation pursuant to the due process clause of the Fourteenth Amendment is still available following this Court's decision in *Graham v. Connor*. *See id.* at 23, 26. Petitioners also urge this Court to reverse the Ninth Circuit's decision to affirm the district court's dismissal of petitioners' federal taking claim on ripeness grounds. *See id.* at 26-28.

While petitioners' raise interesting theoretical issues in their Petition, these issues have no application to the facts of this case. There is, therefore, no reason for this Court to take review of the Ninth Circuit's decision in this case.

I.

THE ISSUES PETITIONERS' SEEK TO RAISE ARE NOT PROPERLY RAISED IN THIS CASE.

Petitioners criticize the Ninth Circuit's decision in this case on two theoretical grounds. One of these grounds concerns the remedies available to a plaintiff in a case addressed by the Fifth Amendment's taking clause. *See* Petition at 20-23. The other ground concerns the ripeness of a federal taking claim seeking invalidation of a land use regulation. *See id.* at 26-28.

The first objection petitioners raise to the Ninth Circuit's decision in this case concerns the dismissal of their substantive due process claim. *See id.* at 20-23. The Ninth Circuit, applying *Armendariz v. Penman* and *Graham v. Connor*, determined that the explicit protection afforded by the taking clause of the Fifth Amendment in the context of this case preempts the more generalized, implicit substantive protections courts have occasionally found in the due process clause. *Macri*, 126 F.3d at 1128-29.

Petitioners object that, since the only remedy for a taking is the payment of just compensation, it is improper to subsume substantive due process claims under a Fifth Amendment taking analysis. *See* Petition at 20-23, 26. Some litigants may be seeking the invalidation of a land use regulation, and they should not be relegated to the remedy of just compensation.[2]

Even if this were true, it would have no application to petitioners. Petitioners seek only compensation in this case. *See*

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2. Aside from the present point that petitioners' objection has no application to the facts of this case, petitioners' objection is also premised upon an incorrect understanding of the law. Government regulations can be, and have been, invalidated pursuant to a taking claim. *See* Point II, *infra* at 6-8.

Macri, 126 F.3d at 1127. A discussion of whether some other litigant ought to be able to obtain the invalidation of a land use regulation has no place in this case.

The second objection petitioners raise to the Ninth Circuit's decision in this case concerns the dismissal of their federal taking claim on ripeness grounds. *See* Petition at 26-28. Petitioners object that it is improper to require all litigants to first seek compensation under state law before asserting a taking claim under the Fifth Amendment. Some litigants might be seeking the invalidation of an unconstitutional land use regulation. Petitioners argue that such litigants should not first have to seek compensation under state law before asserting a federal taking claim. *See id.* at 27.

Again, even if this were true, it has no application to petitioners. Petitioners seek only compensation. *See Macri*, 126 F.3d at 1127. If they receive compensation under state law, the constitutional wrongs they allege will have been fully remedied.

Moreover, petitioners' argument about the ripeness of their federal taking claim is moot in two separate senses. It is moot because petitioners' federal taking claim is now ripe, with or without action by this Court. The district court found petitioners' federal taking claim to be unripe on the ground that petitioners had not yet sought compensation under state law. *Macri*, 126 F.3d at 1127. Following the district court's order in this case, petitioners settled their state taking claim. *Id.* Since they have now sought (and obtained) compensation under state law, there is nothing further petitioners must do to make their federal taking claim ripe. It is not necessary for this court to determine whether petitioners' federal taking claim was properly dismissed on ripeness grounds. This question is moot.

Petitioners argument that their federal taking claim was improperly dismissed on ripeness grounds is also moot because they have been compensated for the taking of their property.

Petitioners settled their state taking claim and have not argued that the remedy for the taking of their property provided by state law was inadequate.[3] *See Macri*, 126 F.3d at 1127. The propriety of the disposition of petitioners' federal taking claim is moot, since they have been fully compensated for the taking of their property.

If this Court is inclined to review the theoretical arguments petitioners attempt to raise, this Court should await a case in which these concerns are actually issues. This is not such a case.

II.

PETITIONERS ARE INCORRECT WHEN THEY ASSERT INVALIDATION IS NOT AVAILABLE UNDER A TAKING CLAIM.

Much of petitioners' argument is premised upon their belief that invalidation is not an available remedy under a taking claim. *See* Petition at 20-23. Petitioners are incorrect.

If private property is taken for a public use, then the Fifth Amendment requires the payment of just compensation. *See* United States Const. Amend. V. As petitioners indicate, many cases recite that the constitution does not prohibit a government from taking private property for a public use. *See* Petition at 17. Under such circumstances, the constitution only requires that just compensation be paid. *Williamson County Regional Planning Comm's v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

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3. Petitioners could not maintain such an argument, both because they voluntarily accepted the adequacy of their state law taking remedy and because Washington courts interpret the taking clause in the Washington State Constitution to provide protection that is identical to that provided by the Fifth Amendment taking clause in the United States Constitution. *See Guimont v. Seattle*, 77 Wash. App. 74, 79, 896 P.2d 70 (1995).

The just compensation remedy does not, however, exhaust the remedies potentially available under a taking claim. The necessary implication of the requirement that just compensation be paid when private property is taken for a public use is that private property cannot be taken for a private use, or for no valid purpose, at all. *Armendariz*, 75 F.3d at 1324.

A land use regulation effects a taking if the regulation does not "substantially advance legitimate state interests." *Agins v. Tiburon*, 447 U.S. 255, 260 (1979). In such a case, the constitutionality of the regulation may not be saved by the payment of just compensation. *Armendariz*, 75 F.3d at 1320, n.5. Rather, the remedy for a land use regulation that affects a taking by failing to substantially advance a legitimate state interest is invalidation. *See Dollan v. City of Tigard*, 512 U.S. 374 (1994) (permit condition requiring dedication of property invalidated on grounds dedication not roughly proportional to impact from development); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (decision of California State Court of Appeal reversed on the basis of the Fifth Amendment taking clause, reinstating superior court decision striking down permit condition); *Hodel v. Irving*, 481 U.S. 704 (1987) (federal statute restricting descent or devise of Indian lands invalidated as a taking); *Armendariz*, 75 F.3d at 1320, n.5 (Fifth Amendment taking clause prohibits private taking, which "cannot be constitutional even if compensated").

When it is recognized that invalidation is available under a taking claim, then petitioners' argument loses its steam. Petitioners urge this Court to reverse the Ninth Circuit's decision in the instant case in order to maintain a litigant's ability to obtain the invalidation of land use regulations (pursuant to a substantive due process claim). *See* Petition at 20-23. Since invalidation is available under a taking claim in a proper case, there is no need to maintain the availability of the more

subjective, generalized protection afforded by a substantive due process claim in a case that is addressed by the explicit protection provided by the Fifth Amendment taking clause. The Ninth Circuit's decision in this case was correct.

III.

THE NINTH CIRCUIT'S DECISION IN THIS CASE DOES NOT EVIDENCE A SIGNIFICANT AND DIRECT CONFLICT WITH EITHER THE DECISIONS OF OTHER CIRCUITS OR THIS COURT'S JURISPRUDENCE.

Petitioners argue that there is a significant and direct split in the circuits with respect to the application of substantive due process claims asserted in the land use context. *See* Petition at 9-16. Petitioners imply that this split in the circuits is relevant to the Ninth Circuit's decision in this case. It is not.

Petitioners cite to the Sixth Circuit's decision in *Pearson v. City of Grand Blanc*, 961 P.2d 1211 (6th Cir. 1992) to support their claim that there is a split in the circuits. Petition at 12-14. *Pearson* does gather substantive due process cases in the land use context from the various circuits and concludes the circuits are split. *Pearson*, 961 F.2d at 1217-19. This split, however, has nothing to do with the Ninth Circuit's decision in this case or, for that matter, the Ninth Circuit's en banc decision in *Armendariz* applying *Graham v. Connor* to private takings. *Pearson* stands for the proposition that the circuits take different approaches to substantive due process claims in the land use context generally, quite apart from and indeed prior to the Ninth Circuit's decision in *Armendariz*. *See Pearson*, 961 F.3d at 1217-19.

Petitioners also cite to *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3rd Cir. 1995) to attempt to show a

significant and direct conflict in the circuits. *See* Petition at 15-16. *DeBlasio*, however, doesn't even mention *Graham*, let alone stand for the proposition that the Third Circuit has considered and rejected the Ninth Circuit's approach under *Armendariz*.

Finally, petitioners cite *Tri County Industries v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997) in support of their claim that there is a significant and direct split among the circuits. *Tri County* is a case in which a substantive due process claim in the land use context is referred to as "oxymoronic" and is dismissed as a matter of law. *See Tri County*, 104 F.3d at 459.

Petitioners are unable to demonstrate that there is a "significant and direct" split among the circuits, which requires this Court's attention. Particularly with respect to the facts and issues presented in this case, petitioners have shown no relevant split among the circuits.

Petitioners also claim that the Ninth Circuit's decision in this case conflicts with this Court's jurisprudence. Petitioners, however, have not cited a single case in which this Court has found a violation of substantive due process in a land use or zoning case. *See* Petition at 17-23. Furthermore, petitioners cite only cases this Court decided prior to *Graham v. Connor* to support the proposition that a land use regulation could potentially violate substantive due process. *See id.* Petitioners have not established the existence of a conflict between the Ninth Circuit's decision in this case and this Court's jurisprudence.

The fact that decisions of this Court prior to this Court's decision in *Graham v. Connor* stated that it was possible that a violation of substantive due process could occur in the land use context is unremarkable. Further, this is hardly a circumstance that justifies review in this case. Likewise, the fact

that some circuits since this Court's decision in *Graham* have continued to recognize the possibility that a land use regulation could violate substantive due process is unremarkable, as well. *See, e.g., DeBlasio*, 53 F.3d 592 (3rd Cir. 1995). Petitioners have cited no cases that have discussed the Ninth Circuit's decision in either *Armendariz* or in the instant case and have explicitly refused to follow it on similar facts.

As far as the instant case is concerned, petitioners have not pointed to any evidence that even suggests that any court would have decided petitioners' substantive due process claim differently than the Ninth Circuit decided it. At most, petitioners have suggested that another circuit might have reached the same result via a different analysis. It is not necessary for this Court to insert itself into the process by which the circuits are coming to grips with the application of *Graham v. Connor* in the context of claims within the ambit of the Fifth Amendment's taking clause in order to enforce orthodoxy in a case, such as the instant case, that all agree is without merit.

The district court in this case determined that petitioners' substantive due process claim is without merit. Further, since petitioners seek only compensation in this case and have in fact been compensated for the alleged taking of their property, there is no reason for this Court to accept review in this case in order to address the theoretical questions petitioners wish to raise.

CONCLUSION

King County respectfully requests that this Court deny the Petition for Writ of Certiorari filed by petitioners in this case.

Respectfully submitted,

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